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No. _____

IN THE
Supreme Court of the United States

REGINALD CLEMONS, ET AL.,
Petitioners,

v.

LARRY CRAWFORD, ET AL.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

In this case, Petitioners challenged the constitutionality of the manner in which the State of Missouri implements its written lethal injection protocol. Petitioners' complaint provided detailed allegations of incompetence and malfeasance in the immediate past by state execution personnel, including the substantial and arbitrary reduction of thiopental, the anesthetic that is necessary to ensure that an execution is humane and thus lawful under *Baze v. Rees*, 553 U.S. 35 (2008). The district court granted Respondents' Motion for Judgment on the Pleadings in its entirety, holding that this Court's decision in *Baze* precluded Petitioners' claims. On appeal, the United States Court of Appeals for the Eighth Circuit affirmed, holding that allegations of incompetence on the part of current and past Department of Corrections ("DOC") personnel in Missouri were insufficient to state a claim. The question presented is:

1. Whether a plaintiff states a claim in a method-of-execution challenge where he alleges a substantial risk of serious harm due to incompetent and untrained personnel, where his complaint includes detailed allegations of incompetence by the state's execution personnel and administrators in the immediate past.

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties before the United States Court of Appeals for the Eighth Circuit.

Reginald Clemons, Richard D. Clay, Jeffrey Ferguson, Roderick Nunley, Michael Anthony Taylor, Martin Link, William Rousan, Mark Christeson, John Charles Middleton, Russell Earl Bucklew, and Earl Ringo, Jr. were all appellees below. Appellants were Larry Crawford, Director, Missouri Department of Corrections; James D. Purkett, Superintendent, Eastern Reception, Diagnostic and Correctional Center, Missouri Department of Corrections; Terry Moore, Director of Adult Institutions, and John Does 1-50, anonymous executioners.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Reginald Clemons, Russell Bucklew, Richard D. Clay, Jeffrey Ferguson, John Middleton, Roderick Nunley, Michael Anthony Taylor, Martin Link, Earl Ringo, Jr., William Rousan, and Mark Christeson respectfully request this Court to issue a writ of certiorari to review a decision of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit, reported at 585 F.3d 1119 (8th Cir. 2009), is reprinted at Pet. App. 1a. The decision of the United States District Court for the Western District of Missouri, unreported No. 07-cv-4129, 2008 WL 2783233 (W.D. Mo. July 15, 2008), is reprinted at Pet. App. 20a. The order of the Eighth Circuit denying rehearing and rehearing *en banc*, is set forth at Pet. App. 32a.

JURISDICTION

The Court of Appeals' judgment was entered on November 10, 2009. A timely petition for rehearing and rehearing *en banc* was denied on December 22, 2009. On March 10, 2010, Justice Alito granted a 30-day extension to file a petition for certiorari. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Eighth Amendment to the Constitution: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

STATEMENT OF THE CASE

A. Introduction

Petitioners Reginald Clemons, Richard D. Clay, Jeffrey Ferguson, Roderick Nunley, Michael Anthony Taylor, Martin Link, William Rousan, Mark Christeson, John Charles Middleton, Russell Bucklew, and Earl Ringo, Jr. are inmates sentenced to death in the State of Missouri. After the Attorney General moved to set execution dates for ten inmates, including five of the Petitioners, Petitioner Clemons requested that the DOC provide information about the qualifications of its execution personnel. In response, the DOC stated that it had not yet designated its team, and that therefore, it had no documentation on the execution personnel's qualifications and licensing information. The DOC's response thus revealed that the State had moved for executions without ensuring it had team members, let alone qualified, trained team members, in place to carry out those executions.

Based on this information, as well as discovery from earlier litigation revealing gross incompetence on the part of the DOC's most recent execution team, Petitioners concluded that the DOC planned to employ an execution team on short notice, without adequate screening or training. Accordingly, on July 9, 2007, Petitioners filed this suit in the Western District of Missouri, alleging that the DOC does not employ competent personnel to carry out the State's written lethal injection protocol, and that implementation of this protocol by unqualified and untrained personnel subjects Petitioners to a substantial risk of excruciating pain in violation of

the Eighth Amendment's ban on cruel and unusual punishment.[1]

B. Missouri's Lethal Injection Protocol

Under Missouri law, complete responsibility for designing and implementing execution procedures is delegated to Defendant Crawford in his capacity as Director of the DOC.[2] *See* Mo. Rev. Stat. § 546.720. In the mid-1990s, in response to a botched execution attempt, Crawford delegated responsibility for designing and implementing its lethal injection executions to a licensed, board-certified surgeon, John Doe I ("Doe I" or "Doe").

Under Doe's leadership, the DOC, like all other States employing lethal injection, adopted use of a three-drug cocktail designed to cause death quickly and without visible movements. Pet. App. 43a. Thiopental, the first drug injected, is an ultrashort-acting anesthetic that must be mixed into solution shortly before it is used. *Id.* The second drug, pancuronium, masks all visible suffering by paralyzing the inmate's muscles. It does not reduce

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[1] Petitioners Clemons, Clay, Ferguson, and Nunley filed the complaint in this case. Pet. App. 34a. The District Court subsequently permitted Petitioners Taylor, Link, Christeson, and Rousan to intervene as plaintiffs. Docket Entries, *Clemons v. Crawford*, Case No. 07-4129-cv-C-FJG (W.D. Mo) ("Dkt. Nos.") 24, 69. The district court denied as moot motions to intervene by Petitioners Middleton, Bucklew, and Ringo Jr. upon granting judgment on the pleadings to Respondents. Dkt. No. 89.

[2] Director Crawford served in that capacity through January 29, 2009, at which point George Lombardi was confirmed as the new Director after being nominated by Missouri's new governor. Lombardi remains the current Director of the DOC.

consciousness of pain. *Id.* The last drug injected, potassium, induces cardiac arrest. When administered in concentrations sufficient to stop the heart, potassium causes an excruciating burning sensation in the veins. *Id.*

Because both pancuronium and potassium inflict extreme suffering if injected into a conscious person, the induction of general anesthesia is crucial to an execution consistent with the Eighth Amendment as this Court applied it in *Baze*. Absent a proper dose of sodium thiopental sufficient to render the prisoner unconscious, "there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride." *Baze v. Rees*, 553 U.S. 35, 53 (2008). Accordingly, if the injection of the intended dose of thiopental is not completely successful, or does not result in deep anesthesia, there is a substantial risk of excruciating pain in violation of the Eighth Amendment. Pet. App 49a.

C. The *Taylor* Litigation

In 2005, Michael Anthony Taylor brought a lawsuit challenging Missouri's procedure for carrying out executions by lethal injection, asserting that the DOC's methods created an unconstitutional risk of excruciating pain in violation of the Eighth Amendment. Pet. App. 45a. At the time, Missouri had no written protocol but rather carried out its procedures in an *ad hoc* manner. *Id.* at 42a-43a. DOC officials delegated complete responsibility for implementing its execution procedure to Doe I – the head executioner – and remained ignorant of, and

indifferent to, Doe's actions on execution nights. *Id.*

During discovery, Taylor learned that Doe I had planned to administer half or less of the amount of thiopental required under the DOC's unwritten *ad hoc* procedure. *Taylor v. Crawford,* 05-4173-CV-C, 2006 WL 1779035, at *7-*8 (W.D. Mo. June 26, 2006); Pet. App 46a. Doe stated that his concern in implementing the execution procedure was to make the DOC "look[] good" by performing executions "with no apparent suffering that the public can observe," so that execution witnesses would not question the State's execution process. *Id.* at 47a-48a.

Consistent with that goal, the evidence obtained in discovery demonstrated that Doe I varied crucial elements of the procedure in a dangerous manner. *Id.* at 46a-48a. Doe I had no training in anesthesia and was unable to calculate or keep track of doses of drugs because he was dyslexic. *Id.* at 47a-48a. It was clear, however, that Doe I had altered the amount of thiopental administered during the execution of other inmates, providing lower doses than what was required under the *ad hoc* procedures. *Id.* at 46a. Doe I's inaccurate records, however, coupled with the paralyzing effects of the pancuronium, made it impossible to determine with any reasonable certainty how much thiopental was administered to other inmates, or whether any of these inmates were properly anesthetized or instead suffered an excruciating death. *Id.* at 43a, 46a-48a. Evidence also revealed that the DOC's other execution team members, who worked under Doe I's supervision, lacked sufficient training and

qualifications to ensure that executions were performed properly or to alleviate Doe I's errors. *Id.* at 56a. The team's problems were exacerbated by the fact that DOC administrators did not understand the medical aspects of the lethal injection procedure and failed to oversee Doe's administration of the lethal injection protocol. Indeed, the DOC's oversight was so poor that it repeatedly overstated in judicial proceedings the amount of thiopental that was administered to executed inmates. *Id.* at 45a-47a. Remarkably, it was later revealed that the DOC had continued to employ Doe I despite knowing he had "medical licensure problems and [a] problematic malpractice history," that included the fact that he was barred from practicing at two Missouri hospitals. *Id.* at 42a-43a.

In response to the evidence revealing the systemic flaws in Missouri's execution process, the *Taylor* district court issued an injunction enjoining all executions in the state, required the DOC to adopt a written protocol that provided for proper monitoring of anesthetic depth by a qualified anesthesiologist, and held that Doe I could no longer take part in executions in the state of Missouri. *Id.* at 48a-49a. In response, the DOC proposed a written protocol, but it failed to implement the district court's other mandated reforms. *Id.* at 50a-54a. Instead, the DOC appealed, arguing that its written procedures did not impose a constitutional risk of pain. *Id.* at 54a.

On appeal, the DOC expressed confidence in its new written protocol, and in Doe I's ability to properly perform executions going forward. Brief of Appellants at 63-66, *Taylor v. Crawford*, No. 06-3651

(8th Cir. Dec. 4, 2006). The Eighth Circuit reversed the district court, holding that the DOC's written protocol did not violate the Constitution. *See Taylor v. Crawford*, 487 F.3d 1072, 1084 (8th Cir. 2007). Ultimately, the court concluded that any likelihood of harm caused by unqualified or poorly trained personnel's failure to follow the protocol would violate the Constitution only if execution team members exhibited deliberate indifference or intentionality. *See id.* at 1085. The opinion did not address the extent to which unqualified or improperly trained personnel created a likelihood of unintended yet harmful deviations from the protocol. The opinion also noted that the court had been informed that Doe I was no longer participating in executions. *Id.* at 1077 n.3.

D. The District Court Proceeding

Four days after the Eighth Circuit issued its ruling in *Taylor*, the Attorney General moved to set execution dates for ten inmates, including several of the Petitioners. *See, e.g.*, Pet. App. 38a-39a. Immediately thereafter, Petitioners discovered that the DOC had not yet put an execution team in place despite the fact that removal of Doe I from the execution team left a personnel and expertise vacuum in the DOC. *Id.* at 55a. The DOC's inability or refusal to designate an execution team while simultaneously seeking the execution of Petitioners raised serious concerns about the DOC's commitment to employ qualified individuals and to provide adequate training to ensure that Petitioners' executions would be carried out without imposing a substantial risk of serious harm.

Accordingly, Petitioners brought this action to challenge the constitutionality not of Missouri's *written* protocol, but rather of the method in which the DOC intended to *implement* its protocol. Pet. App. 57a-59a, 59a-62a. Petitioners' allegations were built on both the evidentiary record – adduced in the *Taylor* litigation – exhibiting the gross incompetence with which the DOC had administered its lethal injection procedure in the past, as well as the DOC's current failure to designate, screen, or train an execution team to perform the executions for which it had moved to set dates. *Id.* at 45a-48a, 50a-54a, 55a-57a, 57a-59a, 59a-62a. The crux of Petitioners' contentions was that though Missouri's protocol may be constitutional as written, it will be implemented in an unconstitutional manner. *Id.* at 50a-54a, 55a-57a, 57a-59a, 59a-62a. More specifically, Petitioners alleged that, just as it had in the immediate past, the DOC will retain incompetent individuals who are not qualified or are inadequately trained to implement the protocol as written, and that the faulty implementation that will result creates a substantial risk of severe and unnecessary pain during the execution process in violation of the Eighth and Fourteenth Amendments. *Id.*

Petitioners' complaint was premised on the fact that the DOC has historically employed execution personnel who, despite paper qualifications, have been unable or unwilling to properly perform even the most basic of the critical tasks of the lethal injection procedure. Pet. App. 36a-38a, 46a-48a, 50a-54a, 55a-57a. Such tasks include properly mixing the lethal injection chemicals, measuring out the

correct dose of thiopental, accurately recording the doses injected, and properly setting the IV lines. *Id.* at 46a, 47a-48a.

In light of these documented examples, Petitioners alleged that the DOC would retain additional execution personnel who were incompetent or otherwise unfit to perform their executions. Pet. App. 57a, 58a-59a, 59a-61a. These concerns were further compounded by the fact that Missouri sought execution dates for ten inmates, but had not yet put its execution team in place, and would therefore have to designate team members on short notice and without proper screening procedures. *See, e.g., id.* at 61a. Petitioners alleged that the DOC would not adequately train those individuals it ultimately retained to perform the lethal injection procedure. *Id.* Petitioners further alleged that the DOC's protocol leaves much to the discretion of its execution team and that the practices developed will depend on the competence and training of the execution personnel.[3] *Id.* at 57a, 58a-59a, 59a-61a

In addition, Petitioners' complaint alleged that the DOC continues to suffer from systemic problems in its execution process, including misplaced priorities and official abdication of responsibility over critical aspects of the lethal injection procedure. Pet. App. 51a, 52a-53a. The DOC's priorities have focused on carrying out executions in a manner that avoids

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[3] In addition, subsequent to the filing of the complaint, the St. Louis Post-Dispatch reported that another member of the execution team, Doe II, has a history of violent criminal activity, including a conviction for aggravated stalking. Dkt. No. 35. The DOC has not denied the Post-Dispatch's account.

observable problems, while leading its personnel to believe that executions must be carried out at any cost, even in the face of serious problems such as an inability to properly mix the lethal chemicals. *See, e.g., id.* at 47a-48a.

Immediately upon filing their complaint, Petitioners moved for expedited discovery to ensure they could obtain discovery and could litigate the case to judgment without having to seek stays of execution. Dkt. Nos. 15-16. The district court granted expedited discovery. Dkt. No. 20. In their initial discovery requests, Petitioners sought discovery into the qualifications and background of the execution personnel, including the disciplinary history and training received by execution team members, as well as the execution logs for all executions in which any member of the current team had participated. Dkt. No. 32, at 1, 13-14. Petitioners also sought depositions of all members of the future execution team. *Id.* at 2. In response, the DOC produced a small number of documents, including email correspondence with the State's expert, Dr. Dershwitz, as well as certain documents concerning a training session on lethal injection conducted by the Federal Bureau of Prisons, which also employs Doe I to lead its executions. *See id.* at Exhibit 3; *see also* Henry Weinstein, *Doctor Barred By State Helps in U.S. Executions*, L.A. Times, Nov. 15, 2007, at A-17, available at http://articles.latimes.com/2007/nov/15/nation/na-johndoe15.

The DOC objected to the majority of Petitioners' discovery requests. Dkt. No. 32 at Exhibit 1. The

DOC maintained that Petitioners' requests were irrelevant, or that the materials requested were protected by security concerns or the attorney-client and work-product privileges. *Id.* The DOC also refused to make execution team members available for deposition even though it agreed that Petitioners were entitled to discovery into the qualifications and training of its execution team. Dkt. No. 32 at 3. And the DOC repeatedly asserted that it had not yet designated the execution team. *Id.* at Exhibit 1.

In response to the DOC's failure to respond to discovery requests, Petitioners filed a motion to compel on November 21, 2007. Dkt. Nos. 31-32. On March 17, 2008, the district court granted the motion, recognizing the validity of Petitioners' challenge to the DOC's implementation of its lethal injection protocol and thus the relevance and importance of the discovery Petitioners sought. Dkt. No. 40. In granting the motion, the district court correctly recognized that Petitioners' challenge was not to Missouri's written protocol, but rather to the manner in which the DOC would carry out that protocol, as well as the training and qualifications of those who would implement it. *Id.* Towards that end, the district court ordered the DOC to produce broad categories of relevant information, including documents wrongly withheld on the basis of attorney-client privilege and the work product doctrine, as well as all information related to all prior executions in which John Does II and V participated.[4] *Id.*

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[4] In their responses to Petitioners' First Set of Interrogatories, Respondents represented that John Does II and V, both

Following the district court's order, Petitioners continued to seek expedited discovery. However, they never received any new documents or information. Instead, on April 16, 2008, before Respondents produced any new material, this Court issued its decision in *Baze v. Rees*, 553 U.S. 35 (2008). The very next day, Respondents filed a motion asking the district court to reconsider its order compelling additional discovery. Dkt. No. 44. Respondents argued that *Baze* rendered the additional discovery irrelevant to Petitioners' claims as a matter of law. *Id.* at 5-6. In their reply brief on the motion for reconsideration, Respondents further informed the district court – for the first time – that they had finally selected the execution team, and that the newly designated team included a registered nurse and an anesthesiologist. Dkt. No. 50 at 3. Respondents attached to their brief redacted copies of licensing certificates, but maintained that any other discovery into the qualifications or training of the execution team was per se irrelevant under *Baze*. *Id.* at Exhibit 1. One week later, on April 25, 2008, Respondents filed a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), arguing that *Baze* foreclosed Petitioners' claims in their entirety. Dkt. No. 47.

On May 15, 2008, the district court granted Respondents' motion to reconsider its order compelling discovery, finding that "the discovery this Court previously ordered to be provided is no longer

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members of the execution team previously led by Doe I, are likely to participate in future executions. Dkt. No. 32 at Exhibit 2, at 6-7.

relevant in light of the *Baze* decision." Dkt. No. 57 at 1. At the same time, the court reaffirmed the viability of Petitioners' challenge to the implementation of Missouri's protocol, noting that "Defendants . . . admit that some discovery is still relevant under the *Baze* decision." *Id.* Accordingly, the district court emphasized Respondents' commitment to produce both "credentials and licensing documents for the registered nurse and the anesthesiologist who have recently been added to the execution team," as well as "information regarding the training that will be provided to the execution team members." *Id.* at 1-2.

In response to this Order, Petitioners expeditiously availed themselves of the limited discovery permitted by the district court, promptly conducting a deposition of Respondent Crawford. Crawford's deposition testimony raised additional concerns about the qualifications and training of the additional individuals the DOC retained to carry out the execution protocol. For example, Crawford testified that the implementation of the protocol could vary depending on the expertise of the individuals who happened to be available to participate in any given execution. Dkt. No. 71 at 1. In addition, though the DOC represented to the district court that its execution team included an anesthesiologist, Crawford revealed that the anesthesiologist is not under any obligation to participate in any execution; rather, according to Crawford, the anesthesiologist merely expressed the willingness to participate if he or she received "sufficient notice" and subject to his or her

availability. *Id.* at 1, 4. Based on this testimony, Petitioners filed a motion to seek further discovery, seeking *inter alia*, depositions of the additional execution team members, and documents relating to the training of these individuals. Dkt. No. 71.

On June 30, 2008, the district court issued an Order denying Respondents' motion for judgment on the pleadings, reaffirming its view that *Baze* did not foreclose Petitioners' claims. Dkt. No. 74. The district court correctly framed Petitioners' case as a challenge to the implementation of the execution protocol, noting that the allegations were "that the lethal chemicals may be improperly prepared or administered by unqualified and untrained personnel." *Id.* at 1. The district court recognized that "the allegations which the plaintiffs are raising in this case were not at issue and were not squarely addressed by the Supreme Court in *Baze*," and on that basis, concluded that "[t]here is nothing in the *Baze* opinion which prevents plaintiffs from bringing the instant action." *Id.* at 4.

One week later, several additional inmates moved to intervene in the district court action. First, on July 7, 2008, Petitioner John Middleton, then an inmate who had an execution date set for July 30, 2008, filed an emergency motion to intervene in the *Clemons* action. Dkt. No. 76. Shortly thereafter, Petitioners Earl Ringo, Jr. and Russell Bucklew – two additional inmates subject to pending motions for execution dates – likewise filed motions to intervene. Dkt. Nos. 78, 81. On July 11, 2008, the Missouri Supreme Court stayed Middleton's execution date, without further explanation, until

further order of the district court. Dkt. No. 86. Middleton and Bucklew notified the court of the stay of execution on July 14, 2008, and argued that the court should permit them to intervene in the *Clemons* action since it seemed unlikely the Missouri Supreme Court would set execution dates while *Clemons* proceeded. Dkt. Nos. 85, 86.

On July 15, 2008 – one day after publication of the Missouri Supreme Court's issuance of the stay, and with no prior notice to the parties – the district court *sua sponte* reconsidered its prior denial of Respondents' motion for judgment on the pleadings. Dkt. No. 89. Upon reconsideration, the district court granted the motion in its entirety, with no acknowledgement of its prior Order in which it recognized that *Baze* did not preclude Petitioners' claims. *Id.* Instead, the district court reversed course, holding that *Baze* and *Taylor* precluded Petitioners' claims, concluding that "[t]he law requires only a year of professional experience. The law does not allow plaintiffs input into who will be performing the executions, as long as they have the requisite experience and are licensed." *Id.* at 4.

E. Proceedings in the Eighth Circuit

On November 10, 2009, the Eighth Circuit affirmed the district court decision. Pet. App. 1a. In their appellate briefing, Petitioners argued that *Baze* did not preclude their challenge to the implementation of Missouri's written protocol. More specifically, Petitioners argued that the district court erred in holding that *Baze* precluded consideration of individual characteristics of execution personnel, and in holding that execution personnel would implement

the written protocol as intended. In addition, Petitioners argued that the district court erred in holding that *Baze* limited the scope of discovery that lethal injection plaintiffs are entitled to, and in denying plaintiffs discovery into the qualifications and training of execution personnel.

In affirming the district court, the Eighth Circuit "confine[d] itself to the question of whether Missouri's protocol violates the Eighth Amendment because of a possibility incompetent or unqualified personnel will improperly prepare or administer the lethal chemicals required by Missouri's protocol." Pet. App. 8a-9a. In answering this question, the Eighth Circuit stated that "[t]he Missouri protocol's safeguards against the risk of maladministration are similar to, and in many ways more stringent than, Kentucky's," *id.* at 12a, and despite the rich evidentiary record amassed during the *Taylor* litigation, "reject[ed] the prisoners' attempt to distinguish their case from *Baze* on the basis of alleged past incompetence on the part of Missouri's medical personnel." *Id.* at 13a-14a. The Eighth Circuit deemed irrelevant all evidence of past incompetence, including the DOC's employment of – and continued confidence in – Doe I. Rather, the Eighth Circuit dismissed Petitioners' numerous contentions concerning the DOC's past track record for hiring unqualified execution personnel while failing to provide adequate training, stating that "[t]he mere allegation Missouri employed an 'incompetent' and 'unqualified' individual in the past simply does not support the prisoners' allegations Missouri will employ 'incompetent' and 'unqualified'

personnel in the future." *Id.* at 15a. Accordingly, the Eighth Circuit held that "[i]n the absence of contrary supporting factual allegations, we will not assume or infer Missouri intends to disregard its own protocol, and this court's instructions, by employing medical personnel who are 'incompetent' or 'unqualified' to perform their assigned duties." *Id.* at 16a.

For these reasons, the Eighth Circuit concluded that judgment on the pleadings was proper. The court did not otherwise address the district court's specific discovery rulings. Petitioners sought rehearing and rehearing en banc. The Eighth Circuit of Appeals denied rehearing on December 22, 2009. Pet. App. 32a.

REASONS FOR GRANTING THE PETITION

I. The Eighth Circuit's Ruling That Petitioners Did Not Allege A Substantial Risk Of Serious Harm Is Erroneous And Conflicts With This Court's Decisions In *Iqbal* And *Twombly*, As Well As With *Baze*.

The decision of the Eighth Circuit flatly contravenes the precedents this Court has set out regarding the pleading of civil claims generally, and the prosecution of Eighth Amendment method-of-execution claims specifically. Petitioners filed a complaint containing detailed allegations of incompetence and malfeasance on the part of the DOC's execution personnel and administration during the immediately preceding executions carried out by Missouri. Petitioners alleged that the DOC's current personnel continued to suffer from

incompetence and a lack of proper training such that they posed a substantial risk of inflicting serious harm during executions. In holding that these allegations failed to state a claim, the Eighth Circuit effectively immunized the DOC's execution practices from all judicial scrutiny. If specific allegations of past and on-going incompetence are insufficient to get past the pleadings stage, then there is no allegation that is sufficient to state a claim. The consequence of the Eighth Circuit's decision is that Petitioners and future plaintiffs will be denied the opportunity to bring to light the types of dangerous execution practices that discovery has revealed in Missouri and elsewhere.

A. The Eighth Circuit's Decision Imposes A Heightened Pleading Standard That Conflicts With *Iqbal* And *Twombly*.

Federal Rule of Civil Procedure 8 requires the plaintiff to present a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). As the Court explained most recently in *Ashcroft v. Iqbal*, this standard "does not require 'detailed factual allegations'" but it does require the plaintiff to demonstrate that his allegations are "plausible," rather than merely "possible." 129 S. Ct. 1937, 1949 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

Petitioners' detailed complaint easily clears the Rule 8 plausibility standard. Petitioners' ultimate allegation is that Missouri is employing incompetent

personnel to carry out executions. But the complaint does not merely assert that conclusion; instead it provides a wealth of supporting allegations, frequently documented by discovery responses from the predecessor litigation.

Specifically, the complaint explains that in the immediate past, Missouri's previous execution team leader, Doe I, had "arbitrarily and secretly var[ied] the dose of thiopental from execution to execution," and "consistently prepared substantially less anesthetic" than Missouri's procedures called for. Pet. App. 46a. The problem was so serious that, to this day, the DOC is unsure precisely how little thiopental it administered. *Id.* at 47a-48a. The DOC knew that Doe I had "medical licensure problems and [a] problematic malpractice history," including that he had been barred from practicing at two Missouri hospitals, but gave him complete authority over the execution process nonetheless. *Id.* at 42a-43a. Indeed, the Department of Corrections continued to stand by Doe I, even when evidence of his malfeasance during executions had come to light. *Id.* at 49a-50a. For example, the head of the Department of Corrections testified that he believed Doe I to be a "bright" "professional" despite his manifest inability to carry out executions constitutionally. *Id.*

The complaint further alleges that when Doe I left the DOC, a few months prior to the filing of the complaint, the Department faced a "knowledge vacuum" because Doe I had previously had complete control and authority over execution procedures. *Id.* at 57a. Post-Doe I, the DOC was left "with no

execution personnel who have sufficient training and experience properly to implement the procedure." *Id.* at 56a. And "because sole responsibility for executions was vested in Doe I, the DOC's officials never developed the basic understanding of the lethal injection procedure and its risks." *Id.* at 57a. The head of the Department of Corrections had in fact stated that the DOC's primary goal was not to carry out humane executions, but rather to bring about the inmate's death with no observable suffering so as not to upset the public. *Id.* at 47a-48a.

Finally, the complaint details the shortcomings of the DOC's new written protocol concerning team member qualifications and training. For example, Petitioners alleged that the new written protocol "fail[ed] to provide any specific information concerning the qualifications or training required of the medical personnel whose services Defendants intend to use in the course of an execution." *Id.* at 50a-51a. Petitioners likewise asserted that the new written protocol failed to include "any requirement that the designated medical personnel will have training and qualifications sufficient to ensure that the condemned inmate reaches and maintains a surgical plane of anesthesia and have no other disqualifying characteristics." *Id.* at 51a. Petitioners alleged that despite the documented malfeasance of Doe I, the written protocol did not eliminate discretion afforded to execution personnel, *see, e.g.*, *id.* at 52a-53a, 60a-61a, and that the new protocol fails to protect against incompetent administration of the procedure. *Id.* at 51a, 59a-60a, 61a. Petitioners

further alleged that the "new protocol is purposefully written to be so vague as to lack meaningful information regarding the level of training and qualifications of the personnel who will perform [Petitioners'] executions." *Id.* at 59a-60a.

Based on all of this, Petitioners alleged that the DOC was not employing competent personnel to carry out executions, and those personnel therefore posed a substantial risk of inflicting serious harm. These allegations clear the plausibility bar necessary to survive the pleadings stage, as a court could "reasonably infer" from these allegations of misconduct and incompetence in the immediate past –including allegations pertaining to existing team members and DOC administrators – that those problems had not yet been sufficiently curbed.

The Eighth Circuit held that judgment on the pleadings was appropriate because it found the complaint's allegations to be merely conclusory. Pet. App. 14a-15a. The Eighth Circuit considered it implausible that the DOC would continue to employ incompetent personnel and fail to train them properly. In particular, the Eighth Circuit found that it was unreasonable to assume that the DOC would continue to have problems given that Doe I was no longer on the execution team. *Id.* at 15a.

The Eighth Circuit's reasoning does not withstand scrutiny. First, it ignores the wealth of allegations of *on-going* problems at the DOC. Missouri's problems were not limited to Doe I's own malfeasance. The reason Doe I was allowed to act improperly was that the DOC was unable or unwilling to gauge the competency of its execution personnel. It was the

DOC that employed Doe I despite knowing that he had been barred from two area hospitals. *See, e.g.*, *id.* at 47a-48a. And it was the DOC that continued to stand behind Doe I even after his malfeasance came to light. *Id.* at 49a-50a. Doe I's departure (and the record does not reveal whether he was fired or left on his own accord) does not mean that the DOC's oversight, retention, and training of execution personnel has improved. Indeed, the fact that the DOC sought execution dates before it had even hired and trained a post-Doe team shows that the DOC had not improved in this regard.

Second, the Eighth Circuit's view that it is implausible to allege a continuing violation from immediately prior bad acts of the same kind is itself untenable. Courts routinely treat past violations as plausibly suggesting that future violations may be forthcoming. *Cf.* 11A Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 2942 at 51 (2d ed. 1995) (explaining that injunction against future misconduct may be warranted despite "protestations of repentance and reform") (quoting *United States v. Oregon State Medical Society*, 343 U.S 326, 333 (1952) (quotation marks omitted). Indeed, in *Twombly* itself, this Court explained that the plaintiff's allegations of price-fixing fell short because "if history teaches anything," it was that the acts alleged were equally consistent with lawful behavior. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567 (2007). Here, "if history teaches anything," it is that the DOC retains and tolerates incompetent personnel.

The reality is that the Eighth Circuit's decision insulates large swaths of DOC practices from judicial review. Any allegation about the deficient implementation of the protocol will necessarily be based on past DOC actions. If the DOC can obtain a dismissal at the pleadings stage simply by contending that past practices – no matter how recent and no matter ingrained – will no longer continue, Rule 8 will not serve as a check on implausible claims, but as a bar to all claims, plausible or not. To be sure, a bare allegation of misconduct is not sufficient to state a claim, but where, as here, the allegations of misconduct are numerous, detailed, and well-grounded, a plaintiff is entitled to proceed.

B. The Eight Circuit's Decision Conflicts With *Baze*.

The Eighth Circuit also justified its dismissal at the pleadings stage on the basis of this Court's decision in *Baze*. *Baze v. Rees*, 553 U.S. 35 (2008). But *Baze* does not support the result below; to the contrary, *Baze* makes clear that Petitioners' allegations do state a claim.

Baze affirmed the legal principle that procedures that pose a substantial risk of serious harm are forbidden by the Eighth Amendment. 553 U.S. at 50 (plurality opinion). And it further recognized that incompetent personnel could pose such a risk. *Id.* at 55 (noting that "most significant" safeguard in Kentucky protocol is that IV Team have at least one year of professional experience). That is precisely the legal claim that Petitioners raise here. To be sure, the *Baze* plurality found that the record in that

case revealed no basis for concluding that Kentucky's personnel were incompetent. But it reached that conclusion on the basis of a full trial record, rather than from a parsing of the pleadings alone.

In contrast, the Eighth Circuit proceeded from the premise that because it found Missouri's procedures to be similar to Kentucky's, Missouri's personnel also must not pose a substantial risk of serious harm. This is an obvious non-sequitur. *Baze* did not hold that execution personnel were categorically competent, such that any claim of incompetence should be dismissed at the pleadings stage. Such a rule would be nonsensical given that incompetent personnel are fully capable of deviating from prescribed procedures and creating grave risks. Missouri's own experience provides a prime example of this. Doe I deviated substantially from Missouri's chosen procedures when he arbitrarily reduced the amount of thiopental delivered to inmates.

The *Baze* decision in no way forecloses a challenge to the competence of the execution team and the ability to constitutionally carry out an execution. *Baze* sets out the standard that method-of-execution challenges must satisfy under the Eighth Amendment. Petitioners' complaint alleges a violation that states a claim under that standard. The Eighth Circuit was simply incorrect when it held that because a trial revealed no constitutional risk in Kentucky, it could conclude as a matter of law at the pleadings stage that no risk existed in Missouri as well.

II. There Is Considerable Confusion In The Lower Courts Regarding The Pleading Standards Applicable To Method-Of-Execution Claims.

In addition to being plainly incorrect, the Eighth Circuit's decision deepens the confusion of lower courts, post-*Baze*, concerning the type of allegations that are sufficient to state a claim in a method-of-execution challenge. For while most lethal injection challenges have been resolved on summary judgment or after a trial, there is a substantial split of authority among those courts that have considered the type of allegations necessary to state a claim or to satisfy an analogous standard.

On one side, the Fifth Circuit has adopted an approach that is consistent with the Eighth Circuit's. In *Raby v. Livingston*, the Fifth Circuit affirmed the dismissal of a lethal injection claim, finding that *Baze* barred the claims as a matter of law. -- F.3d -- --, No. 08-20772, 2010 WL 909097 (5th Cir. March 15, 2010). *Raby* was decided on summary judgment, but the circumstances of the case put it on all fours with this one. The plaintiffs in *Raby* had obtained minimal discovery before the district court stayed the case, pending the outcome of this Court's decision in *Baze*. *Id.* at *1. Immediately after the stay was lifted, defendants moved for summary judgment, while the plaintiff sought additional discovery pursuant to Federal Rule of Civil Procedure 56(f). *Id.* at *1-*2. The district court found that summary judgment was appropriate as a matter of law under *Baze*, and denied additional discovery. *Id.* at *2. On appeal, the Fifth Circuit affirmed, holding that the district court would have abused its discretion to

allow additional discovery because *Baze* barred method-of-execution challenges as a matter of law. *Id.* at *9 ("We read *Baze* to foreclose exactly the type of further litigation that Raby seeks to continue. The safe harbor established by *Baze* would hardly be safe if states following a substantially similar protocol nonetheless had to engage in prolonged litigation defending their method of lethal injection.").

In contrast, the Sixth Circuit has taken a far less strict view of when allegations challenging a method-of-execution may proceed in an analogous situation. For example, in *Reynolds v. Strickland*, 583 F.3d 956 (6th Cir. 2009), the Sixth Circuit granted a stay of execution to a prisoner who challenged "the competence of the lethal injection team" after Ohio had experienced difficulties placing IVs during several executions using procedures that were similar to those used in Kentucky. 583 F.3d at 957. Thus, for the Sixth Circuit, it was enough to show that Ohio had problems carrying out executions in the immediate past, just as Petitioners have alleged here. And given that the standard for obtaining a stay is more stringent than the standard for stating a claim in that the former requires a likelihood of success while the latter requires only that success be plausible, *Reynolds*'s analysis conflicts with the reasoning the Eighth Circuit employed here.

Likewise, in *Jones v. Bradshaw*, the Sixth Circuit considered whether a plaintiff could proceed with a federal habeas claim challenging Ohio's method of execution. No. 07-3766, Slip Op. (6th Cir. July 23, 2008). The district court, in a ruling issued prior to *Baze*, held that the habeas claim had to be dismissed

because Ohio's three-drug protocol was the same as those used by the majority of other states, and was thus per se constitutional. *Jones v. Bradshaw*, 489 F. Supp. 2d 786, 844 (N.D. Ohio 2007). Post-*Baze*, the Sixth Circuit granted a certificate of appealability on the lethal injection claim, and ultimately remanded the claim to the district court for "limited discovery" and an evidentiary hearing. *Jones v. Bradshaw*, No. 07-3766, Order (6th Cir. Jan. 30, 2009). In doing so, it found that *Baze* established that the relevant question was whether a protocol posed a substantial risk of serious harm, and it held that question could be answered only through the development of a factual record.

In addition, several federal district courts have held that allegations less detailed than Petitioners' were sufficiently plausible to state a claim under *Baze*. For example, in *Chester v. Beard*, 657 F. Supp. 2d 534 (M.D. Pa. 2009), the plaintiffs alleged, *inter alia*, that they faced a substantial risk of serious injury from the fact "that the personnel charged with administering Pennsylvania's death-penalty protocol are insufficiently trained, and that the Commonwealth has put in place inadequate safeguards to ensure that condemned inmates do not suffer extreme pain and suffering during their executions. . . ." *Id.* at 544-45. The State filed a motion to dismiss contending that the plaintiffs' allegations were legally insufficient under *Baze*. *Id.* at 542. The district court denied the motion. In reasoning contrary to that of the Eighth Circuit's, the court held that the plaintiffs' allegations, if true, would demonstrate a substantial risk of serious

harm within the meaning of *Baze*. It then held that the plaintiffs were entitled to prove their claims "notwithstanding the outcome in *Baze*" because *Baze*'s refusal to invalidate the Kentucky protocol "relied upon the substantial factual findings that were developed in the Kentucky state courts." *Id.* at 544. Because *Baze*'s "narrow[]" holding was not dispositive of plaintiffs' claims at the pleading stage, the court denied the motion to dismiss. *Id.* at 542, 545.

Likewise, in *Thorson v. Epps*, the district court denied Mississippi's motion to dismiss where the plaintiffs had alleged that the state's executioners were inadequately trained. 4:08-CV-129-WAP, 2009 WL 1766806 (N.D. Miss. June 22, 2009). The court rejected the state's argument that *Baze* foreclosed the claims, noting that *Baze* "was decided only after the factual record was completely developed." *Id.* at *1. The court then held that the plaintiff's allegations of executioner incompetence, if taken as true, "plausibly would entitle him to relief." Similarly, other courts also found that a plaintiff plausibly alleged that lethal injection protocols violated the Eighth Amendment. *See also Taylor v. Jones*, No. 05-CIV-0825-F, Slip Op. at 2 (W.D. Okla. Dec. 5, 2008) (Docket No. 139) (denying motion to dismiss post-*Baze* because complaint alleged substantial risk of serious harm and an "evidentiary record would be helpful" to assess validity of claims).[5]

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[5] While these cases were decided by district courts, they should be treated as having contributed to a material split of authority because the denial of a motion to dismiss is not final,

The Eighth Circuit's decision below is diametrically opposed to the reasoning in these cases. The Eighth Circuit found that Petitioners had failed to state a plausible claim even in light of their detailed allegations of immediate past misconduct and flawed institutional oversight by the DOC. Conversely, in the cases described above, the plaintiffs were allowed to move past the pleadings stage on the basis of more general allegations of executioner incompetence.

III. Either Summary Reversal Or Plenary Consideration Of The Decision Below Is Appropriate.

As we have explained, the Eighth Circuit's decision is erroneous under this Court's Rule 8 jurisprudence and its Eighth Amendment jurisprudence. This is not a case in which the allegations in question are on the borderline of the Rule 8 plausibility threshold. Thus, because the Court of Appeals' error is clear, this case is appropriate for summary reversal and remand for continuing proceedings, including discovery as the district court sees fit in its discretion to allow.

Alternatively, Petitioners ask that this Court set the case for plenary consideration on the merits so as to give the lower courts greater guidance as to what type of allegations state a claim under *Baze*.

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and generally not appealable. As a result, the courts of appeals have limited opportunities to address the correctness of a district court's decision to allow a case to proceed in the face of a motion to dismiss.

CONCLUSION

The petition for a writ of certiorari should be granted.

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